

No. 82-1795

Supreme Court U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER
CAPITAL CITIES CABLE, INC.

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REPLY BRIEF FOR PETITIONER
CAPITAL CITIES CABLE, INC.

I. RESPONDENT HAS NOT REFUTED PETITIONER'S SHOWING THAT OKLAHOMA'S ADVERTISING BAN UNCONSTITUTIONALLY RESTRICTS COMMERCIAL SPEECH.

1. Respondent does not claim that the wine advertisements in question are false or misleading or that they promote an illegal product. Nor does respondent attempt to justify Oklahoma's ban on those advertisements as a limited time, place or manner restriction. To the contrary, respondent describes the Oklahoma ban as a "total prohibition"¹ intended to diminish sales and consumption

¹ Brief of Respondent ("Resp. Br.") at 86, 93.

of alcoholic beverages.” As discussed in our opening brief, this is precisely the sort of blanket ban that this Court has repeatedly condemned.³

Contrary to respondent’s suggestion, the Court’s strong stance against blanket bans on protected expression was not relaxed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980),⁴ and was later expressly reaffirmed in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 (1981), in which the Court declared that “[a] State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information’s effect upon its disseminators and its recipients.” Oklahoma’s ban on alcoholic beverage advertising is conceded by respondent to be precisely this sort of suppression. It is accordingly invalid under the First Amendment.

2. Respondent’s efforts to demonstrate that the ban satisfies the *Central Hudson* test are unavailing. The third part of the test requires the state to show that the restriction directly and effectively advances the asserted state interest—here the interest in combatting alcohol abuse. Respondent attempts to make this showing by referring for the first time to a 1980 study by researchers at Michigan State University.⁵ However, the study’s findings do not support respondent’s position since they provide no evidence that wine advertising significantly

² See, e.g., Resp. Br. at 86.

³ Brief of Petitioner Capital Cities Cable, Inc. (“Cap. Cities Br.”) at 12-17.

⁴ See *id.* at 14-15.

⁵ C. Atkin & M. Block, *Content and Effects of Alcohol Advertising*, Michigan State University (1980), prepared for the Bureau of Alcohol, Tobacco and Firearms, the Federal Trade Commission, the National Institute of Alcohol Abuse and Alcoholism, and the Department of Transportation.

increases overall alcohol consumption or alcohol abuse.⁶ Apart from this study, respondent relies solely on a claimed "common-sense judgment" that advertising of alcoholic beverages encourages alcohol abuse.⁷ This is an insufficient justification under the *Central Hudson* test. As this Court has made clear, the party seeking to uphold a content-based restraint bears the burden of demonstrating the link between the regulation and the asserted state interest and must do so with record evidence, rather than with mere conjecture or "plausible" assumptions.⁸ There is no evidence in this record establishing such a link.⁹

⁶ While the study found some correlation between the advertising of alcoholic beverages and overall consumption, it concluded that the relationship is "not strong," *id.* at 23, and that the principal effect of the advertising is to increase consumer awareness of particular brands. *Id.* at 13-15, 19. The study also found that the relationship between wine advertising and consumption was "not significant" among young people and "weak[]" among adults. *Id.* at 20, 22. The publication cited by Amicus S.A.N.E., Inc.—M. Jacobson, G. Hacker & R. Atkins, *The Booze Merchants* (1983)—is similarly devoid of any statistical or other evidence linking wine advertising with increased consumption, excessive drinking, or alcoholism. See Brief of Amicus S.A.N.E., Inc., at 4-6.

⁷ Resp. Br. at 89.

⁸ *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). See also *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875, 2882 n.20, 2994 (1983); *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-79 (1977).

⁹ Respondent relies on *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), as holding that such a showing is not required in this case. Resp. Br. at 87-89. As discussed in petitioner's opening brief, *Metromedia* is not controlling here, since it did not involve a content-based restriction. Cap. Cities Br. at 19. See also Comment, *Alcoholic Beverage Advertising and the First Amendment*, 52 Cin. L. Rev. 861, 897-98 (1983) ("Comment"). Moreover, the Court emphasized in *Metromedia* that numerous legislatures and courts had recognized that the restriction in question effectively advanced the asserted state interests. 453 U.S. at 509-10. Here, in contrast, only one other state (Mississippi) has enacted a general prohibition of

3. Respondent has also failed to show that the ban satisfies the fourth part of the *Central Hudson* test—the absence of alternative measures less destructive of First Amendment rights. Respondent simply ignores various alternatives suggested by petitioner in its opening brief and by the district court below, including stricter time, place and manner restrictions on the dispensation of alcohol, labeling requirements on alcoholic beverage containers or in places where alcohol is sold, and educational programs to inform people of the dangers of alcohol abuse.¹⁰ Respondent also fails to show that an outright prohibition of the sale of alcoholic beverages would not adequately serve the State interest.

4. Respondent asserts various reasons why the protection accorded commercial speech should be relaxed in the circumstances of this case. First, respondent contends

alcoholic beverage advertising, and not even Mississippi prohibits cable operators from transmitting wine advertisements that originated outside the State. See *Dunagin v. Orford*, 718 F.2d 738, 741 (5th Cir. 1983).

Amicus State of Mississippi suggests that the Court in *Central Hudson* recognized a link between advertising of a product and its increased consumption. Brief of Amicus State of Mississippi ("Miss. Br.") at 9-10. Even assuming that the advertising of certain brands of wine increases consumption of those brands, this does not necessarily mean an increase in the overall consumption of wine or alcoholic beverages, much less an increase in alcohol abuse, and a ban on the advertising of wine cannot be justified on this basis. Cf. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 570 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 95-96.

¹⁰ See Cap. Cities Br. at 22-23; Appendix G to the Petition for Certiorari ("Pet. App. G") at 48a-49a. The Kerr Report on Alcohol Abuse in Oklahoma, a 1979 study relied on by respondent as evidence of the State's alcohol problem, stressed educational programs as the most promising route toward prevention of alcohol-related problems. The study did not even mention restrictions on advertising as an important part of the prevention effort. See *Alcohol Abuse in Oklahoma*, The Kerr Foundation, Inc. (1979) at 4, 45-46, 53.

that the advertisements in question are entitled to lesser protection because wine is not a "vital necessit[y]"—because it ranks lower "on any relative scale of consumer values" than other products whose advertising has been protected by this Court; and because the advertisements consist primarily of name and image promotion, rather than specific information about prices within Oklahoma.¹¹ However, this Court has never suggested that protection for commercial speech should turn on the value of the advertised commodity or the usefulness of the particular information conveyed. To the contrary, this Court has specifically rejected the drawing of a constitutional distinction "between publicly 'interesting' or 'important' commercial advertising and the opposite kind." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).¹² It has also recognized that commercial speech which informs consumers of the existence and qualities of lawful products, with or without specific price information, is entitled to First Amendment protection.¹³

¹¹ Resp. Br. at 75-77.

¹² See also *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (state court erred in upholding advertising ban on the ground that the advertising was of small value to society and conveyed little useful information).

¹³ Thus, the Court has struck down restrictions on advertising which lacked price information, see, e.g., *In re R.M.J.*, 455 U.S. 191 (1982); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), which was simply generic in character, see, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and which promoted services available outside the state. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Amicus State of Mississippi suggests that this Court has recognized an exception to the First Amendment protection of commercial speech when the product advertised is "harmful." Miss. Br. at 6. For this proposition, amicus relies on *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), summarily *aff'd*, 405 U.S. 1000 (1972), in which a federal statute prohibiting the advertising of cigarettes on radio and television was upheld. Of

Respondent also asserts that First Amendment standards should be relaxed in this case because of the State's "special prerogatives under the Twenty-First Amendment."¹⁴ As demonstrated in petitioner's opening brief,¹⁵ respondent's construction of the Twenty-first Amendment is not supported by any of the cases relied on by respondent and is contradicted by the Amendment's history and by decisions of this Court.¹⁶

Finally, respondent argues that the ban is entitled to special deference because the wine advertisements in question are in the form of electronic signals delivered directly to the home. For this proposition respondent relies on

course, the Court's summary affirmance in *Capital Broadcasting* has limited precedential impact and must be narrowly confined to its particular facts and issues. See, e.g., *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). The *Capital Broadcasting* decision involved federal rather than state regulation and rested on the propositions that commercial speech has negligible First Amendment protection and that the publisher or broadcaster of paid advertising has no First Amendment interest in the advertising itself. 333 F. Supp. at 584-85. Both propositions were later rejected by this Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and other decisions regarding commercial speech.

¹⁴ Resp. Br. at 56.

¹⁵ Cap. Cities Br. at 23-28.

¹⁶ See, e.g., *Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505 (1982); *Craig v. Boren*, 429 U.S. 190 (1976), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Respondent does not even discuss these decisions. Instead, respondent relies on readily distinguishable cases sustaining regulation of liquor licensees (*New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), *California v. LaRue*, 409 U.S. 109 (1972), and *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982) (summary dismissal of appeal), see Cap. Cities Br. at 27-28) and on *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1935) (three-judge court), a case in which no First Amendment claim was raised, which preceded by thirty years this Court's recognition that advertising is entitled to First Amendment protection, and which includes no mention whatsoever of the Twenty-first Amendment.

FCC v. Pacifica Foundation, 438 U.S. 726 (1978). However, the Court emphasized in *Pacifica* that it was upholding only a narrow restriction on the time and manner of the speech in question, rather than an outright ban such as is presented here¹⁷ and that the restriction reached only the transmission of indecent or offensive material.¹⁸ Whatever special latitude may be appropriate for federal regulations on the broadcasting of indecent or offensive speech is not appropriate here.¹⁹

II. RESPONDENT HAS NOT REFUTED PETITIONER'S SHOWING THAT THE OKLAHOMA BAN IMPERMISSIBLY RESTRAINS THE DISSEMINATION OF NON-COMMERCIAL SPEECH.

Petitioner demonstrated in its opening brief that Oklahoma's ban on alcoholic beverage advertising will compel cable operators in Oklahoma to cease their carriage of out-of-state programming that contains wine advertisements, since they are unable to delete the advertisements from the programming.²⁰ Respondent contends that the asserted restraint is based on economic and technological factors that make deletion of wine advertisements only impracticable, rather than impossible, and therefore is not constitutionally significant.²¹ This argu-

¹⁷ *FCC v. Pacifica Foundation*, 438 U.S. 748, 750 (1978); *id.* at 757, 760 (Powell, J., concurring). Cf. *Carey v. Population Services International*, 431 U.S. 678, 712 n.8 (1977) (Powell, J., concurring).

¹⁸ 438 U.S. at 750.

¹⁹ This Court has suggested in dictum that "the special interest of the federal government in regulation of the broadcast media" might permit greater federal restrictions on advertising on radio or television. *Bolger v. Young's Drug Products Corp.*, 103 S. Ct. at 2884. Even if so, this interest does not translate into a justification for state—or even federal—regulation of advertising transmitted by cable systems.

²⁰ Cap. Cities Br. at 29-37.

²¹ Resp. Br. at 95-99.

ment is without merit. It is undisputed that deletion of the advertisements is forbidden by non-deletion requirements included in the Federal Communications Commission's regulations and in the federal Copyright Act of 1976.²²

Moreover, the technical and economic barriers to commercial deletion are severe, and well-documented in the record.²³ In arguing that these barriers are irrelevant, respondent ignores this Court's traditional sensitivity in the First Amendment area to economic and other factors that can restrain protected expression. The imposition of economic burdens that effectively curtail speech violates the First Amendment as surely as direct prohibition.²⁴

²² As we discuss below, respondent's suggestion that these requirements cannot be relied on here because they are unconstitutional is wholly misplaced. See pages 9-14, *infra*. See also *Cap. Cities Br.* at 5, 29-30.

²³ See *Cap. Cities Br.* at 30-31. Respondent's argument also overlooks technical factors which indeed make impossible the complete and instantaneous deletion of wine advertisements. The experimental study relied on by respondent to show the feasibility of the deletions, *Cable Television Report and Order*, 36 F.C.C.2d 143, 156 (1972), actually demonstrates the opposite. That study was conducted in order to determine the feasibility of deleting commercials from distant signals and substituting local advertisements. The Commission found that commercial deletions were possible only with the "close cooperation" of broadcasters and were "dependent on visual and audio cues in the program material" to alert cable operators to an upcoming commercial. *Id.* at 165, 156. Because it concluded that cable operators would be unable to secure the necessary cooperation of broadcasters, the Commission decided not to adopt rules which would have required the deletion of commercial messages in distant signals. *Id.* at 165. It is undisputed that petitioners here receive no advance warning or "visual or audio cues" from broadcasters or programming services to indicate when a wine commercial will appear. See *Cap. Cities Br.* at 30.

²⁴ See, e.g., *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 93; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Martin v. Struthers*, 319 U.S. 141, 146 (1943). See generally

Because, as the district court found here, the burdens imposed on cable operators by the Oklahoma ban would leave them "no feasible way" to carry out-of-state programming that contains wine advertisements,²⁵ the ban is as offensive to the First Amendment as a direct ban on the programming itself.

III. RESPONDENT HAS SHOWN NO REASON WHY, IN THE FACE OF DIRECT CONFLICT WITH FEDERAL LAW AND POLICIES, THE BAN IS NOT PREEMPTED.

1. Respondent concedes that the Oklahoma ban directly conflicts with provisions of the Copyright Act²⁶ and of the cable regulations of the Federal Communications Commission²⁷ that prevent cable operators from deleting advertisements.²⁸ Respondent attempts initially to sidestep this conflict by claiming that the non-deletion provisions cannot furnish a basis for preemption because they violate the First Amendment rights of cable operators.²⁹ Respondent, however, is not the proper party to raise such a claim.

Respondent alleges no injury to his own interests as a result of the provisions' alleged unconstitutionality suffi-

Buckley v. Valeo, 424 U.S. 1 (1976); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). See also *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383, 390 (1973); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 610 (1976) (Brennan, J., concurring).

²⁵ Pet. App. G at 41a.

²⁶ 17 U.S.C. § 111(c)(3); § 111(b)(3) (1982).

²⁷ 47 C.F.R. § 76.55(b) (1982).

²⁸ Resp. Br. at 59.

²⁹ Id. at 19-24. Respondent does not challenge the constitutionality of the "must carry" rules themselves, only of the companion requirement that when any broadcast signals are carried, they must be carried in full.

cient to present a justiciable "case or controversy" within the meaning of Article III. *Linda R. S. v. Richard D.*, 410 U.S. 614, 616-18 (1973); *Baker v. Carr*, 369 U.S. 186, 204 (1962). The sole injury identified by respondent is "elimination of the cable operators' editorial discretion."³⁰ Yet it is well established that a litigant who is not himself injured "may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972).³¹

It is particularly inappropriate for respondent to suggest that federal provisions should be held unconstitutional in this case because they violate the constitutional rights of these petitioners and other cable operators, a claim that petitioners are not themselves asserting. Moreover, if the federal non-deletion restrictions were unconstitutional,³² it would seem necessarily to follow that Oklahoma's affirmative ban on speech at issue in this case would surely violate the First Amendment. It is bizarre for respondent to plead First Amendment protection of cable operators in defense of a State statute that suppresses cable operators' speech.

2. Respondent next argues that a "traditional Preemption or Supremacy Clause analysis" is not appropriate in

³⁰ Resp. Br. at 23.

³¹ See also *Heald v. District of Columbia*, 259 U.S. 114, 123 (1922) (Brandeis, J.) ("one who would strike down [an act of Congress] as violative of the Federal Constitution must show . . . that the alleged unconstitutional feature injures him"); *California Bankers Association v. Shultz*, 416 U.S. 21, 51 (1974) (bank not injured by regulation abridging depositors' Fourth Amendment rights).

Even if injury to respondent could be established, respondent's claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975); *id.* at 500 n.12.

³² It is particularly difficult to see how the non-deletion requirement in the Copyright Act, a condition of copyright licenses, could violate the First Amendment.

this case despite the direct and admitted conflict between the State and federal provisions.³³ Respondent contends that because the State law in question concerns liquor, the analysis "must begin with a presumption of State power,"³⁴ and claims that this Court's precedents dictate use of a "balancing test" to determine whether the State ban or the federal provisions ought to prevail.³⁵ Respondent also suggests, without support, that the invalidation of the federal requirements would result in "no social harm."³⁶

Respondent grossly misperceives the nature of the Twenty-first Amendment's impact on federal power. The cases cited by respondent in which a federal law or action was alleged to conflict with the Twenty-first Amendment all concerned laws or actions that purposefully regulated commerce in liquor. See, e.g., *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).³⁷ Even with respect to this type of federal action, the Court has consistently held that the Twenty-first Amendment does not oust Congress from the field of liquor regulation under the Commerce Clause so long as the federal action does not unduly intrude upon a core area of liquor regulation expressly committed to the states by the Twenty-first Amendment: "transportation or importation . . . for delivery or use." See, e.g., *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 110. This Court has

³³ Resp. Br. at 26.

³⁴ Id.

³⁵ Id. at 44.

³⁶ Id. at 65.

³⁷ The other cases primarily relied on by respondent involved attacks made on state liquor laws under the dormant Commerce Clause. See, e.g., *State Board v. Young's Market Co.*, 299 U.S. 59 (1936). Such cases have no relevance where, as here, Congress has acted.

never invalidated any federal regulation of commerce in liquor as violating the Twenty-first Amendment.³⁸

In any event, this case does not involve federal action taken under the Commerce Clause to regulate commerce in liquor and the Twenty-first Amendment therefore cannot be argued to limit federal power. The Copyright Act was enacted pursuant to the Copyright Clause, and the Twenty-first Amendment plainly works no diminution in Congress' power to legislate under the Copyright Clause. See, e.g., *Craig v. Boren*, 420 U.S. 190, 206 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964). Conflicting state laws are necessarily preempted. *Goldstein v. California*, 412 U.S. 546, 570 (1973).³⁹

Similarly, here Congress in the Communications Act has not drawn upon its power under the Commerce Clause to regulate commerce in liquor; rather the Commission, acting under federal authority, has sought to regulate cable television.⁴⁰ Respondent cites no case, and we are aware of none, holding that balancing is appropriate where a state liquor law directly conflicts with a federal law passed under the Commerce Clause but not having as its purpose the regulation of liquor.⁴¹ Under respondent's

³⁸ See *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973), 421 U.S. 599 (1975).

³⁹ See also Comment, *supra* note 9, at 876-77.

⁴⁰ Respondent acknowledges that neither Congress nor the Commission had any intention of regulating commerce in liquor through the Communications Act and regulations issued thereunder. Resp. Br. at 66-67.

⁴¹ The only case cited by respondent in which a federal regulation has been struck down on the basis of the Twenty-first Amendment is

expansive reading of the Twenty-first Amendment, the Amendment would effectively repeal the Supremacy Clause whenever an act of Congress—no matter how far removed from liquor regulation—had an incidental effect on a state regulation related to alcoholic beverages.

3. Respondent also argues that the Copyright Act and the Communications Act were not meant to occupy their respective fields.⁴² However, both this contention and the cases cited by respondent are irrelevant. Petitioner has never argued that Congress intended to preempt the entire cable or copyright fields, only to preempt the limited area of cable signal regulation.⁴³ No case cited by respondent suggests that Congress may not preempt this limited area, as it has done through the Commission. Moreover, even if there were no intent to occupy a portion of the field, the State law cannot survive the direct conflict with federal law and regulations that exists here.⁴⁴

4. Finally, respondent claims that the Oklahoma ban would not “undermine[] . . . Congress’ intent . . . to create a nationwide scheme of compulsory licensing” in the Copyright Act.⁴⁵ The truth is that there could be *no*

Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 949 (1980), *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980). Since the federal action in *Castlewood* (regulating relationships between retailers and wholesalers) directly regulated commerce in liquor, the case is inapposite here.

⁴² Resp. Br. at 48-59.

⁴³ Cap. Cities Br. at 40-42.

⁴⁴ Respondent’s cases do not establish the contrary. In *Goldstein v. California*, 412 U.S. 546, 570 (1973), there arose “[n]o . . . conflict between state law and federal law.” Similarly, even respondent recognizes that *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), turned on “the absence of any direct conflict between the State advertising regulation and some specific element of [the Communications Act].” Resp. Br. at 50-51. See also *Roth v. Pritikin*, 710 F.2d 934 (2d Cir.), *cert. denied*, 104 S. Ct. 394 (1983).

⁴⁵ Resp. Br. at 55.

compulsory licensing of out-of-state commercial signals in Oklahoma if the ban is enforced against cable operators doing business there. If Oklahoma cable operators cannot adhere to Congress' demand that they make no commercial alterations or substitutions, they will lose the right to retransmit distant broadcast signals pursuant to compulsory licenses from program suppliers. Instead, the only way they could continue to show distant broadcast programs to their viewers would be to purchase from each program's copyright holder the right to retransmit the program. Yet it was just such a system which Congress rejected as impractical and unduly burdensome because, aside from the time and money that would be expended by cable operators, many copyright holders were unlikely to give retransmission consent. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).⁴⁶

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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⁴⁶ The Commission also has rejected such a scheme. See *Memorandum Opinion and Order*, 79 F.C.C.2d 652, 803, *aff'd*, *Malrite T.V. v. FCC*, 652 F.2d 1140, 1146-47 (2d Cir. 1980); *Cable Television Report and Order*, 36 F.C.C.2d 143, 164 (1972).